

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Chapter 11  
FURNITURE FACTORY ULTIMATE .  
HOLDING, L.P., et al, . Case No. 20-12816(JKS)  
Debtors. . 824 Market Street  
 . Wilmington, Delaware 19801  
 . Thursday, September 16, 2021

TRANSCRIPT OF VIDEO HEARING RE:  
FIRST AMENDED JOINT PLAN OF LIQUIDATION  
BEFORE THE HONORABLE J. KATE STICKLES  
UNITED STATES BANKRUPTCY JUDGE

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1 (Proceedings commence at 10:00 a.m.)

2 THE ECRO: Counsel, you are live in the courtroom  
3 and the hearing is about to begin. Please remember to state  
4 your name for the record when you speak and every time you  
5 speak. Please keep your video off and stay muted if you're  
6 not speaking to the Judge, so that the Judge can concentrate  
7 on the parties that are presenting at the time. Thank you.

8 THE COURT: Good morning. This is Judge Stickles.  
9 We're on the record in Furniture Factory Ultimate Holding,  
10 Case Number 20-12816.

11 This is a hearing on confirmation --

12 MR. PACITTI: Judge, if you're speaking, I can't  
13 hear you. I don't know if the Judge ... Katherine, can you  
14 hear me?

15 THE COURT: Can you hear me now?

16 MR. PACITTI: Can you hear the Judge?

17 THE COURT: I can hear you. Mr. Pacitti, can you  
18 hear me now? No.

19 (Court and court personnel confer)

20 THE COURT: Can you hear me now?

21 MR. PACITTI: I can, yes, I can.

22 THE COURT: Thank you. Thank you for interrupting  
23 me.

24 MR. PACITTI: It's all right.

25 THE COURT: Good morning, everyone. This is Judge

1 Stickles. We're on the record in Furniture Factory Ultimate  
2 Holdings, Case Number 20-12816. This is the hearing on  
3 confirmation of the debtors' first amended joint plan of  
4 liquidation.

5 I'll turn the podium over to debtors' counsel,  
6 please.

7 MR. PACITTI: Thank you, Your Honor. For the  
8 record, Domenic Pacitti and Michael Yurkewicz, who I believe  
9 is on by phone, of Klehr Harrison Harvey Branzburg, on behalf  
10 of the debtors. And --

11 THE COURT: Good morning, Mr. Pacitti.

12 MR. PACITTI: Good morning, Your Honor. Good to  
13 see you again.

14 Your Honor, as you said, we are here on one matter  
15 that's on our agenda that we filed at Docket 497, and that's  
16 confirmation of our first amended joint plan of liquidation.

17 Your Honor, as we always do, we've tried to resolve  
18 as many issues that have been raised as possible in advance  
19 of today's hearing. And to that end, we actually have  
20 reached resolution with a number of folks, and they were the  
21 informal objections of the Comptroller of Public Accounts and  
22 the filed objection of the Texas taxing authorities, and we  
23 resolved that through language that was inserted in the  
24 proposed confirmation order that was filed at Docket 490, and  
25 that's at Paragraphs 84 and 85, respectively,.

1           We'd like to thank Mr. Hackman at the outset  
2           because we've been going through this case with him and  
3           dealing with a lot of issues behind the scenes, and he's  
4           worked, as he always does, with us hand in hand, to try to  
5           resolve issues and limit things that we might need to bring  
6           to the Court for determination, and this case was no  
7           different than our experience with Mr. Hackman. So we really  
8           appreciate all the effort he's put into these cases  
9           throughout, including at the disclosure statement hearing and  
10          leading up to plan confirmation.

11          And in that vein, we continued to try to narrow, as  
12          best we could, those issues with the United States Trustee,  
13          and we have made some progress and resolved several issues.  
14          And in fact, Your Honor, we resolved another one literally  
15          minutes before we all joined on the Zoom call today.

16          We did insert in Paragraph 86 of the proposed  
17          confirmation order additional language that resolves various  
18          issues with Mr. Hackman, and they relate -- and we'll address  
19          it later -- but they specifically relate to a couple of  
20          matters. And there's one other or two other additions that  
21          we'll make to the confirmation order that we'll address  
22          later.

23          But what I think we're down to is, effectively, the  
24          third-party release, whether it's consensual is appropriate  
25          or not, and the exculpation provisions, in terms of the time

1 period covered, and I guess the interplay with a provision in  
2 the trust agreement as it relates to that. But I think the  
3 others have been resolved, Your Honor, so at least that's  
4 good news.

5 THE COURT: Thank you. And I appreciate the  
6 parties working together. I realize it takes a lot of  
7 effort, and I'm glad there's a good line of communication and  
8 you've worked to resolve matters.

9 MR. PACITTI: Thank you, Your Honor. We keep  
10 trying to do that.

11 So, Your Honor, if it pleases the Court, I would  
12 propose to proceed as follows: Perhaps just do like a brief  
13 overview of the plan and the BS process and how we got to  
14 leading up to today, moving on to the evidentiary record in  
15 support of confirmation, and then address the remaining  
16 objections of Mr. Hackman, and then turn it over to folks who  
17 may want to speak in favor of the plan. And then I'm sure  
18 Mr. Hackman would like to address his objections. And I'm  
19 just wondering: Is that an acceptable approach to Your  
20 Honor?

21 THE COURT: Certainly.

22 MR. PACITTI: Does that make sense. Okay.

23 THE COURT: That makes --

24 MR. PACITTI: Great.

25 THE COURT: -- perfect sense.

1 MR. PACITTI: Awesome.

2 So, Your Honor, back on June 3rd of 2021, after  
3 working closely with the committee's counsel Mr. Gayda and  
4 Ms. LoTempio, Mr. Samis and Ms. Good, the debtors filed their  
5 joint Chapter 11 plan of liquidation, which was at Docket  
6 375. We also filed the disclosure statement with respect to  
7 that plan at Docket 376. And we filed our disclosure  
8 statement and solicitation procedures motion at Docket 377.

9 After they were filed, as Mr. Hackman always does,  
10 he gives -- he sends us an email with his thoughts and his  
11 comments, and we tried to work through all of those and  
12 continued discussions with the committee and up until July  
13 20th of 2021, where we made various changes to the plan, the  
14 disclosure statement, the disclosure statement order, and the  
15 exhibits attached to that order with respect to the  
16 solicitation packages.

17 And we filed, on July 20th, our first amended joint  
18 Chapter 11 plan at Docket 412, the disclosure statement with  
19 respect to that plan at Docket 414, redlines with respect to  
20 each of those at Dockets 413 and 415 respectively. And we  
21 filed a notice of a proposed revised order with revised  
22 exhibits with respect to approval of the disclosure statement  
23 and the solicitation materials.

24 Your Honor, on July 23rd, we were in front of Your  
25 Honor for the disclosure statement hearing. And afterwards,



1 Your Honor entered an order approving the disclosure  
2 statement at Docket 425. If Your Honor recalls, it contained  
3 further changes that Your Honor requested with respect to the  
4 various notices and ballots and the like.

5 Consistent with that order, Your Honor, on July  
6 28th, the debtors filed the solicitation version of the plan  
7 at Docket 430, the solicitation version of the disclosure  
8 statement at Docket 431, and we filed the confirmation  
9 hearing notice at Docket 433.

10 Your Honor, those solicitation materials were  
11 served by Stretto, consistent with the disclosure statement  
12 approval order, as reflected in Stretto's affidavit of  
13 service regarding those solicitation packages. It was filed  
14 on August 4th at Docket 453.

15 Additionally, Your Honor, the debtors published the  
16 confirmation hearing notice in the New York Times National  
17 Edition on July 30th, in compliance with the disclosure  
18 statement order and Bankruptcy Rule 2002. And that's  
19 evidenced by the affidavit of publication that was filed on  
20 August 2nd, at Docket 446.

21 Additionally, Your Honor, and in further compliance  
22 with the disclosure statement order, on August 31st of 2021,  
23 the debtors filed and served a notice of plan supplement at  
24 Docket 481. That notice contained a copy of the liquidating  
25 trust agreement and declaration of trust as Exhibit A, the

1 identification of the liquidating trustee as Exhibit B, and  
2 the identification of the liquidation trust advisory board  
3 members as Exhibit B. Those pleadings also set forth the  
4 proposed compensation for the plan -- the liquidating  
5 trustee, as well.

6 Your Honor, the voting deadline in this case was  
7 September 8th of 2021. And as reflected in the declaration  
8 of Angela Tsai from Stretto that was filed at Docket 488 on  
9 September 13, 2021, there were four classes that could vote  
10 on the plan.

11 Classes 4, 5, and 6 did not vote on the plan and  
12 did not otherwise object to the plan.

13 Class 7, which is our general unsecured claim  
14 class, voted overwhelmingly in favor of the plan. It was 95  
15 percent of those who voted, voted in favor, in terms of  
16 number of votes; and 99.82 percent of folks, in terms of the  
17 amount of claims, voted in favor of the plan.

18 Your Honor, in support of plan confirmation, on  
19 September 13th, the debtors also filed the declaration of  
20 Donald V. Roach, who is the debtors' COO and CFO, in support  
21 of confirmation at Docket 489.

22 We also filed our memorandum of law in support of  
23 confirmation at Docket 491 and we filed a notice of proposed  
24 confirmation order at Docket 490.

25 Your Honor, briefly, the plan is effectively the

1 continuation of the wind down of the debtors' business and  
2 its affairs and the continued liquidation of the remaining  
3 assets of the debtor.

4 The plan provides that a plan liquidating trustee  
5 will be appointed, as selected by the committee; that that  
6 liquidating trustee will:

7 Receive the "liquidation trust assets," as defined  
8 in the plan;

9 Establish operating and claims reserves, as are  
10 necessary to carry out the terms of the plan;

11 Perform claims reconciliation process;

12 Prosecute or settle or abandon any of the retained  
13 causes of action;

14 And then, ultimately, calculate and make  
15 distributions under the plan.

16 And that's sort of a brief overview of what we've  
17 put forth before the Court today.

18 Your Honor, in terms of the evidentiary record --  
19 and I did ask Mr. Hackman if he would agree, and he did agree  
20 that he would -- that we could move into evidence, in terms  
21 of the direct case, the voting declaration of Ms. Tsai, who's  
22 here on the Zoom call today, at Docket 488, and the  
23 declaration of Mr. Roach that was filed at Docket 489, and  
24 Mr. Roach is on the call, as well, today. So we would move  
25 those into evidence.

1 THE COURT: Let me ask. Could Ms. Tsai and Mr.  
2 Roach make themselves available on Zoom? I see you're both  
3 on Zoom.

4 Does anyone objection to the admission of the Roach  
5 declaration at Docket Number 489 or the Tsai declaration at  
6 Docket 488 for purposes of the debtors' case-in-chief in  
7 connection with confirmation of the plan today?

8 (No verbal response)

9 THE COURT: I hear none. The declaration is  
10 admitted.

11 (Roach Declaration received in evidence)

12 (Tsai Declaration received in evidence)

13 THE COURT: Is there any party participating today  
14 that expects to cross-examine Mr. Roach or Ms. Tsai regarding  
15 the content of their declarations? Okay. Hearing none, the  
16 deck --

17 MR. HACKMAN: Your Honor, this is Ben Hackman.

18 THE COURT: Yes, Mr. Hackman.

19 MR. HACKMAN: I'm sorry, Your Honor. May it please  
20 the Court.

21 THE COURT: Good morning.

22 MR. HACKMAN: I would like to cross-examine Ms.  
23 Tsai and Mr. Roach briefly --

24 THE COURT: Okay.

25 MR. HACKMAN: -- if I may --

1 THE COURT: Okay.

2 MR. HACKMAN: -- at the appropriate time.

3 THE COURT: All right. Thank you.

4 Mr. Pacitti.

5 MR. PACITTI: Sure. Your Honor, we would also, I  
6 guess, move into evidence or ask Your Honor to take judicial  
7 notice of the affidavits of service with respect to  
8 solicitation at Docket 453, the affidavit of publication at  
9 Docket 446, and the plan supplement filing at Docket 481.

10 THE COURT: So noted.

11 MR. PACITTI: Your Honor, I guess, given that Mr.  
12 Hackman would like to cross-examine, I was going to get into  
13 sort of just the general requirements of confirmation and  
14 address his objections. I didn't know if you wanted to hear  
15 the cross-examination first, or would you like us to proceed  
16 through the argument and address any objections first?

17 THE COURT: Could we -- could I hear the argument  
18 first?

19 MR. PACITTI: Sure.

20 THE COURT: And then Mr. Hackman, in the context of  
21 the argument, would you like to cross-examine Ms. Tsai and  
22 Mr. Roach? Does that work for you?

23 MR. HACKMAN: Whatever pleases the Court, Your  
24 Honor.

25 THE COURT: Okay.

1 MR. HACKMAN: I'm happy to proceed however you  
2 would like. Thank you.

3 THE COURT: Let's hear argument first.

4 MR. PACITTI: Okay. Thank you, Your Honor.

5 Your Honor, as I mentioned previously, the proposed  
6 confirmation order reflects the resolutions with various of  
7 the objecting parties, including most of the objections of  
8 Mr. Hackman. And we believe that we have satisfied the  
9 provisions of Section 1129 of the Bankruptcy Code by a  
10 preponderance of the evidence. We believe that the plan  
11 complies with the relevant provisions of the Code and the  
12 Rules and non-bankruptcy law. And as set forth in our  
13 memorandum and in Mr. Roach's declaration, the plan fully  
14 complies with the requirements of Sections 1122, 1123, and  
15 1129.

16 And Your Honor, I know we have argument to make,  
17 so, rather than reciting all of the sort of nuts-and-bolts  
18 plan confirmation requirements, we'll just rely on our  
19 memorandum of law, the record, and Mr. Roach's declaration  
20 and Ms. Tsai's declaration, and we'll address the remaining  
21 objections of Mr. Hackman, if that's okay.

22 THE COURT: That's fine.

23 MR. PACITTI: So, Your Honor, with respect to the  
24 language that resolves the remaining objections, Paragraph  
25 86, what we have agreed with Mr. Hackman is that we would

1 include an additional provision that says, pursuant to  
2 Section 1141(d) (3) of the Bankruptcy Code, neither the plan  
3 or this order shall be deemed to provide the debtors a  
4 discharge. That was one of the objections that Mr. Hackman  
5 raised in the context of Article (ix) (A), which was the 9019  
6 settlement feature of the plan, which the language already  
7 addresses.

8 Additionally, the language at -- the filed  
9 provision at Paragraph 86 provides that any persons or  
10 entities that are set forth on the voting declaration at  
11 Exhibit B who packages were undeliverable would not be deemed  
12 a releasing party, and that seemed appropriate, Your Honor.  
13 We're certainly not seeking to impose a consensual release on  
14 folks who didn't get notice. So it's -- those folks are  
15 carved out of that release.

16 THE COURT: And that is what was in your  
17 confirmation brief.

18 MR. PACITTI: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. PACITTI: And then the additional language that  
21 we agreed to, leading right up to the hearing, is, I guess  
22 with -- it goes to sort of the objection regarding the scope  
23 of the release. And that's specifically at Section -- or  
24 Article (ix) (D) (2) of the plan. We, along with the  
25 committee, have agreed to remove -- or put in the

1 confirmation order that the language will be removed that:

2 "-- upon any other act or omission, transaction,  
3 agreement, event, or other occurrence taking place  
4 on or before the effective date."

5 That language appears at like -- I think it's --  
6 one, two, three -- perhaps the third line up at the bottom of  
7 that paragraph, Your Honor.

8 THE COURT: Okay.

9 MR. PACITTI: Mr. Hackman was concerned that that  
10 seemed to be over-broad and perhaps go beyond what the scope  
11 of the release provided above. So we're happy to take out  
12 that language, and I think that that would resolve his  
13 objection, as it relates to the scope of the release.

14 THE COURT: Could you read that language to me one  
15 more time, please?

16 MR. PACITTI: Sure, Your Honor. I'm working off of  
17 my cribbed notes. I don't have the actual page of --

18 THE COURT: That's all --

19 MR. PACITTI: -- the -- where the --

20 THE COURT: I under -- I found the section. I just  
21 need to you to read me the language again.

22 MR. PACITTI: Yeah. It's -- it begins, I think  
23 it's the fourth or fifth line up.

24 "-- upon any other act or omission, transaction,  
25 agreement, event, or other occurrence taking place



1 on or before the effective date."

2 It's that language --

3 THE COURT: Yes.

4 MR. PACITTI: -- that we will strike from the  
5 release provision.

6 THE COURT: Okay.

7 MR. PACITTI: Okay.

8 THE COURT: Thank you.

9 MR. PACITTI: You're welcome, Your Honor.

10 So, Your Honor, I think what that does is it leaves  
11 us with, as I said, the two remaining issues.

12 And with respect to the third-party release  
13 provisions and whether they're consensual or not, first of  
14 all, Your Honor, we're not seeking non-consensual releases;  
15 rather, we believe that the structure of the plan, the  
16 solicitation procedures, the various notices and ballots  
17 approved at the disclosure statement hearing are all  
18 sufficient to establish that the third-party releases here  
19 are, in fact, consensual releases. And as we've set forth in  
20 our response to the objections in our brief, there is ample  
21 authority from courts in this district that provide that  
22 consent itself, and not affirmative consent, is an  
23 appropriate standard for consensual third-party releases.

24 Now, Your Honor, we're mindful of the holdings in  
25 Washington Mutual and in the Emerge case. But what we do is,

1 instead, we argue that those decisions, number one, are  
2 controlling on each of the judges in our district; and that,  
3 likewise, there's ample authority in this district with other  
4 courts in this district that follow Indianapolis Downs and  
5 acknowledge that, when you have a process that allows you to  
6 check a box to opt out of a release or otherwise provide for  
7 an objection mechanisms for objecting to a third-party  
8 release, that it's permissible, so long as those methods are  
9 conspicuous and set forth in the various notices and ballots.  
10 And we cite to those cases in our brief, Your Honor, and I  
11 won't go through each of them.

12 I do want to note that, however, recently, Judge  
13 Goldblatt addressed these issues in the Alex and Ani case,  
14 albeit at the disclosure statement stage of the case. But he  
15 stated, in ruling on the disclosure statement and the  
16 approval of the appropriateness of the opt-out provisions  
17 that he was persuaded, as a general proposition, that  
18 parties-in-interest in a bankruptcy case are affected by what  
19 happens in a plan, and that they -- and if they have a  
20 problem with what's happening to them under the plan, it's  
21 incumbent on them to say so; and that, so long as disclosure  
22 is sufficiently obvious and conspicuous and that the third  
23 party has the opportunity to opt out, it's appropriate to  
24 treat the failure to do so as evidence of consent.

25 He also indicated, Your Honor, that approving a

1 disclosure statement that has all of these features -- and  
2 certainly, it was at that stage that he was making this  
3 determination, and then later confirming a plan -- or not  
4 confirming a plan that went down that road of opt-out  
5 provisions. In his mind, it was just -- and I'll see how he  
6 phrased it is "it's a strange way to run a railroad," is what  
7 he said.

8 And we agree with him today here, Your Honor. Your  
9 Honor, here, each of the notices of the confirmation hearing  
10 -- which was a matrix mailing -- each of the ballots, each of  
11 the nonvoting notices contained conspicuous language about  
12 the releases, contained specific conspicuous direction about  
13 opting out and what would happen if you did not opt out or  
14 otherwise object to the release. And in fact, Your Honor  
15 asked for additional disclosure, which we were happy to do,  
16 and we made those changes in the various notices and ballots.

17 More importantly, Your Honor, the process actually  
18 worked here. As Exhibit B of the voting declaration sets  
19 forth, of the 81 ballots cast on -- in the solicitation  
20 process, 18 of those ballots chose to opt out of the release.  
21 And in fact, one ballot that was returned, the party chose to  
22 abstain from voting either for or against the plan, but  
23 nevertheless opted out of the release.

24 So, Your Honor, we really believe that, because of  
25 the clear and conspicuous language in the various notices and

1 ballots, the evidence that the process actually worked and  
2 parties, in fact, opted out of releases, that we provided  
3 that folks who did not get notice by undeliverable  
4 solicitation packages not being bound by virtue of the  
5 revised language in the order, we believe that the third-  
6 party releases are, in fact, consensual, and that Your Honor  
7 should follow Judge Shannon's Indianapolis Downs case and the  
8 other cases that follow his direction in this district and  
9 overrule the U.S. Trustee's objections and approve the third-  
10 party releases as consensual releases.

11 With respect to the exculpation time period, Your  
12 Honor, the plan's exculpation provision does arguably  
13 contemplate some prospective terms because the definition of  
14 "exculpated claim" in the plan includes any claim arising  
15 after the petition date and on or before the closing of the  
16 Chapter 11 cases. Mr. Hackman believes that this should just  
17 stop as of the effective date of the plan.

18 Number one, we think, first of all, that this type  
19 of a -- if you want to even call it "prospective" type of  
20 exculpation is entirely permissible under the facts here and  
21 under the case law. Like on a practical level, Your Honor,  
22 the prospective exculpation creates a positive incentive,  
23 right? For fiduciaries to carry out and implement a plan  
24 and, particularly here, a liquidating plan, where this is not  
25 a reorg where, you know, we go effective and we close the

1 case in a week and there's a reorg entity outside of the  
2 bankruptcy operating its business and not dealing with  
3 anything anymore to do with the Bankruptcy Court. This is a  
4 different animal, right? This is a liquidating plan. And  
5 notwithstanding that there is an effective date, there is  
6 still more to do in this case.

7 So the trustee obviously points out correctly that  
8 the exculpation should be limited to estate fiduciaries that  
9 served during the Chapter 11 proceedings. We're not arguing  
10 with that, Your Honor. What we're saying is that, number  
11 one, the Chapter 11 proceedings aren't finished as of the  
12 effective date. The exculpation here actually is limited to  
13 those parameters. the exculpated parties here are the  
14 debtors, the committee, the members of the committee, solely  
15 in their capacities as such, and the liquidating trustee.

16 The real disagreement here lies that -- where the --  
17 -- is that the debtors contend that the facts are that the  
18 Chapter 11 proceedings simply don't stop on the effective  
19 date. The liquidating trustee is an estate fiduciary. Under  
20 the plan, he's taking over the role of the debtors post-  
21 effective-date to continue the wind down of the affairs of  
22 the debtor, to continue to liquidate the remaining assets, to  
23 bring causes of action, to file tax returns, to reconcile  
24 claims, and to ultimately make distributions under the plan.  
25 All of those functions are core to what a Chapter 11

1 proceeding is, Your Honor. So I don't think just arbitrarily  
2 -- sorry, sorry -- picking the effective date in the context  
3 of these cases makes sense, in terms of what the scope of the  
4 exculpation provision should cover.

5 Further, Your Honor, there's courts in this  
6 district that often confirm plans with similar provisions.  
7 And we cite the SFP case, the Orexigen case, and the Relay  
8 Company case in our brief, and we will rely on those.

9 So, Your Honor, we believe that, because the  
10 exculpation is limited to the estate fiduciaries that covers  
11 a time period, albeit post-effective-date, but a period that  
12 encompasses the Chapter 11 proceedings and the functions of  
13 the Chapter 11 proceedings, that Your Honor should overrule  
14 the U.S. Trustee's objections and approve the exculpation  
15 provisions of the plan.

16 Your Honor, that's all I have, in terms of  
17 argument. I didn't know if anyone else wanted to speak up in  
18 favor of the plan, but ...

19 THE COURT: Yeah, let me hear from anyone who wants  
20 to speak in favor of the plan, and then I would like to hear  
21 from Mr. Hackman.

22 MS. LOTEMPPIO: Good morning, Your Honor. Catherine  
23 LoTempio, Seward & Kissel, on behalf of the Official  
24 Committee of Unsecured Creditors.

25 THE COURT: Good morning.

1 MS. LOTEMPPIO: Good morning.

2 First, the committee just wanted to express our  
3 thanks to the parties involved in this case, including all of  
4 the professionals, the Office of the United States Trustee,  
5 and Your Honor. With the hard work of everyone involved, we  
6 are pleased to be here today presenting a mostly consensual  
7 plan, with only a few minor open points that Mr. Pacitti  
8 addressed.

9 And the committee is in agreement with the debtors  
10 that the plan is in the best interests of the estate and  
11 should be confirmed today. The plan really is a culmination  
12 of the successful sale of the debtors' assets to American  
13 Freight and an implementation of a settlement as part of that  
14 sale that provided the debtors cash to remain in the estates,  
15 which now permits us to fund a liquidation trust.

16 So, as the U.S. Trustee pointed out, the amount to  
17 be distributed to unsecured creditors today remains  
18 uncertain. But the U.S. Trustee focused only on the lower  
19 end of possible distributions. And with the liquidation  
20 trust in place, the liquidation trustee will be in -- well  
21 positioned to pursue the retained causes of action that have  
22 been preserved for the benefit of the states, which, if  
23 successful, could provide a meaningful distribution to  
24 creditors. This was something that was not a certain  
25 possibility on the petition date.

1           So I know Mr. Pacitti addressed the U.S. Trustee's  
2       objections, and I'll briefly just address them, as well, and  
3       try not to repeat too much of what Mr. Pacitti said. We also  
4       -- the committee also joins in the arguments of the debtors.

5           So, briefly, with respect to the U.S. Trustee's  
6       objection to the consensual third-party releases, the --  
7       here, we just agree with Mr. Pacitti's observation that all  
8       creditors receiving ballots were made aware of their ability  
9       to opt out of the releases and the consequences for not  
10      returning the ballot.

11          The opt-out nature of the ballots was approved in  
12      connection with the disclosure statement, and creditors could  
13      also file an objection to the plan, in order to not be a  
14      releasing party under the plan. And as Mr. Pacitti noted, I  
15      mean, the opt-out function of the releases did work in this  
16      case and we did have creditors opting out.

17          So we respectfully submit that the creditors who  
18      are properly (indiscernible) of their rights and did not opt  
19      out of the releases should be held to have consented to the  
20      releases and ask that Your Honor overrule the United States  
21      Trustee's objection and approve the third-party releases.

22          With respect to the temporal scope of the  
23      exculpation clause, we would also note that the exculpation  
24      clause is limited to estate fiduciaries acting in their  
25      fiduciary capacity; has a carveout for fraud, wilful



1 misconduct, and gross negligence. And I think the debtors  
2 explained this in their confirmation brief, but an  
3 exculpation clause is sort of separate and distinct from a  
4 release of liability, which does have a temporal  
5 (indiscernible)

6           Instead, an exculpation clause sets a standard for  
7 liability that applies to estate fiduciaries in the context  
8 of the entire Chapter 11 case. And courts in this district  
9 have routinely approved exculpation clauses that are limited  
10 to estate fiduciaries in Chapter 11 (indiscernible) post-  
11 effective-date. And I think the debtors have cited to some  
12 of those cases in their confirmation brief.

13           And then Mr. Pacitti also noted that these Chapter  
14 11 cases don't end with the effective date. So, here, the  
15 plan provides for claims administration, distribution,  
16 pursuit of causes of action, all to occur post-effective-  
17 date. And we believe the exculpation clause should function  
18 to equally apply the same standard of liability for estate  
19 fiduciaries who are acting within the scope of their duties  
20 during the entirety of the Chapter 11 proceedings.

21           THE COURT: What is the anticipated effective date  
22 in this case?

23           MS. LOTEMPPIO: I'll defer to Mr. Pacitti on that.

24           MR. PACITTI: I think we were contemplating the end  
25 of the month, Your Honor.

1 THE COURT: Okay. Thank you.

2 MS. LOTEMPPIO: Yeah. And just lastly, I think more  
3 to the point here is that we believe the U.S. Trustee's  
4 concerns with the temporal scope of the exculpation clause  
5 are really, truly resolved by the actual language contained  
6 in the provision, which is really only limited to post-  
7 effective-date actions that are necessary for the  
8 implementation and administration of the plan. So exculpated  
9 parties here are not getting exculpation indefinitely for all  
10 actions, but instead, the time period for which they  
11 performed their duties and obligations under the plan. And I  
12 would just note that limiting the scope of the exculpation to  
13 pre-effective-date actions would render meaningless these  
14 administrative and implementation clauses contained in the  
15 exculpation clause.

16 And I think Mr. Pacitti mentioned, but -- this, but  
17 when faced with a similar objection from the U.S. Trustee in  
18 the SFP Franchise case, Judge Dorsey agreed that an  
19 exculpation clause was properly limited where it applied only  
20 to those actions of a fiduciary in connection with the  
21 implementation and execution of a plan after the effective  
22 date. So we respectfully submit that this is the correct  
23 interpretation of the exculpation clause and ask Your Honor  
24 to overrule the United States Trustee's objection on this  
25 point.

1           This is all I have, unless Your Honor has any  
2 questions.

3           THE COURT: I do not.

4           Does anyone else wish to be heard in support of the  
5 plan?

6           (No verbal response)

7           THE COURT: Hearing none, I'd like to hear from Mr.  
8 Hackman, I'd like to hear from the U.S. Trustee regarding  
9 their objection. Good morning, Mr. Hackman.

10          MR. HACKMAN: Good morning, Your Honor. Can Your  
11 Honor hear me okay?

12          THE COURT: Yes, I can.

13          MR. HACKMAN: Thank you.

14                I'd like to start by thanking counsel for working  
15 with us to resolve parts of the objection that we filed to  
16 confirmation. The -- as counsel indicated, the two sort of  
17 broad open issues at this point for us are the third-party  
18 releases and the exculpation.

19                We submit that the third-party releases should not  
20 imposed on general unsecured creditors in Class 7 who did not  
21 return a ballot. As I read the numbers from Stretto, the  
22 solicitation package was sent to about 557 general unsecured  
23 creditors in Class 7; 81 of them voted, 51 packages were  
24 undeliverable. And the debtors, as Mr. Pacitti mentioned,  
25 are agreeing that those 51 creditors whose solicitation

1 packages were undeliverable will not be releasing parties.

2 But even after subtracting out those 51 members of  
3 Class 7, about 84 percent in amounts -- in numb -- I'm sorry  
4 -- 84 percent in number and 67 percent in amount of Class 7  
5 creditors did not return a ballot. But the debtors want to  
6 impose third-party releases on those creditors in virtue of  
7 the fact that they took no action.

8 Inaction is not consent. Judge Walrath indicated  
9 that in Washington Mutual, Judge Owens indicated it in Emerge  
10 Energy Services, and the Bankruptcy Court for the Southern  
11 District of New York indicated that in the Chassix and  
12 SunEdison cases. Although, as counsel pointed out, there are  
13 cases that reach a different conclusion, such as Indianapolis  
14 Downs. If I have my dates right, Indianapolis Downs precedes  
15 Emerge Energy, Chassix, and SunEdison.

16 We submit that carelessness, inattentiveness,  
17 mistake, or even problems with mail delivery are alternatives  
18 -- alternate explanations for why creditors may not have  
19 returned ballots. And carelessness or inattentiveness may  
20 exist here because this case is so thin.

21 The debtors' assets were significantly under-  
22 secured. American Freight FFO bought the debtors' assets for  
23 a purchase price that did not really come close to paying off  
24 the first lien debt. I understand that American Freight FFO  
25 is waiving its deficiency claim. But even after that, the

1 debtors will need to significantly reduce their 503(b)(9)  
2 claims pool. And I understand the committee intends to  
3 object to Class 5 and Class 6 claims as part of a strategy  
4 for getting a distribution to unsecured creditors in Class 7.

5 As we sit here today, as I read Mr. Roach's  
6 confirmation declaration, Paragraph 35 would suggest that  
7 it's possible some administrative claimants may need to take  
8 a haircut.

9 In the SunEdison case, the New York Bankruptcy  
10 Court held that creditors who were eligible to vote, but did  
11 not vote, had not consented to the third-party releases. The  
12 Court wrote that inaction may have been explained by what was  
13 described as the plan's, quote, "meager recovery," for which  
14 unsecured creditors was less than three percent. And that's  
15 576 B.R. at Page 461.

16 In this case, 3 percent is the high-end projection  
17 for unsecured creditors. The low-end projection is two-  
18 hundredths of 1 percent. That's not a penny on the dollar;  
19 that's a penny on \$50. Class 7, as a whole, is projected as  
20 being owed about \$30 million in the disclosure statement. If  
21 they get a .02 percent distribution, they would be sharing  
22 pro rata in about \$6,000.

23 THE COURT: But Mr. Hackman --

24 MR. HACKMAN: The plan --

25 THE COURT: -- you would agree --

1 MR. HACKMAN: -- also says that --

2 THE COURT: -- I don't need to get to that point if  
3 these releases are consensual.

4 MR. HACKMAN: Well, Your Honor, we submit that the  
5 debtors have not shown that they're consensual. We submit  
6 that simply not taking action is not a manifestation of  
7 consent to the releases. And we submit that, because the  
8 recoveries, the projected recoveries in this case are so  
9 uncertain and so small, that that could lead to indifference  
10 or inaction by creditors in determining not to return a  
11 ballot.

12 The other point I would make is the plan's  
13 distribute -- the plan's *de minimis* distribution threshold is  
14 \$50. And if the distribution tends towards the low end at  
15 .02 percent, and if my math is right, any Class 7 creditor  
16 owed less than \$250,000 would not get a recovery under the  
17 plan because their distribution would fall under the *de*  
18 *minimis* threshold. The only -- it's possible that only the  
19 largest unsecured creditors would receive a distribution  
20 under this plan.

21 Mr. Pacitti referenced the Alex and Ani decision --  
22 bench ruling I gather -- from Judge Goldblatt. I would note  
23 that that transcript appears to have been at a hearing held  
24 on August 20th. This disclosure statement was approved a  
25 month before that, on July 23rd. And our office had given

1 plan and disclosure statement comments to debtors' counsel a  
2 month before that, on June 24th, and we raised the third-  
3 party release concern with counsel then. So, for counsel to  
4 cite a hearing transcript that was two months after we had  
5 given our comments and almost a month after Your Honor had  
6 already approved the disclosure statement and solicitation  
7 procedures, to say that the U.S. Trustee should have raised  
8 the consent issue then, we think is not fair.

9 I would also observe that Washington Mutual and  
10 Emerge Energy are confirmation decisions, not disclosure  
11 statement decisions.

12 And we submit that, for those reasons, general  
13 unsecured creditors who have not returned a ballot should not  
14 be deemed to consent to the third-party releases.

15 We also submit that the releases are non-consensual  
16 as to the debtors' current and former employees. The debtors  
17 closed more than half of their stores pre-petition. And as I  
18 read Paragraph 4 of Mr. Roach's confirmation declaration, the  
19 debtors had 270 employees on the petition date. Pre-  
20 petition, that number was 675 employees. And by the way  
21 Article 1(b), an in bravo, (87) is worded, at Part (f), all  
22 of the debtors' current and former employees would be  
23 releasing parties. We're not aware of a showing that those  
24 former employees got notice or had a chance to opt out or  
25 that they're getting consideration for having releases

1 imposed on them. And the same thing, we would submit, goes  
2 for current employees. So we submit employee third-party  
3 releases are non-consensual, as well.

4 We don't believe those releases satisfy  
5 Continental, we don't believe they satisfy fairness, the  
6 fairness hallmark, because releasing creditors will not seek  
7 consideration for being subjected to the release. And they  
8 may not get any distribution under the plan at all. It  
9 doesn't appear to us that the majority of the release parties  
10 have provided consideration to receive a release.

11 The necessity hallmark is absent, we submit,  
12 because the releases are not needed for the debtors to  
13 reorganize. The debtors are liquidating and releases are not  
14 needed for the debtors to finish their wind down and have  
15 their remaining assets monetized and distributed to  
16 creditors.

17 We would also -- we also believe that there are no  
18 extraordinary circumstances here to distinguish this case  
19 from any other Section 363 sale case.

20 So, for these reasons, we do not believe that the  
21 releases satisfy the Third Circuit exacting jurisprudence on  
22 non-consensual third-party releases. Third-party releases  
23 should not be imposed on general unsecured creditors who did  
24 not return a ballot, should not be imposed on employees.

25 As to exculpation, as counsel indicated, the plan



1 defines "exculpated claim" to mean acts and omissions  
2 relating to the Chapter 11 cases and arising after the  
3 petition date and on or before the closing of the Chapter 11  
4 cases. And as we interpret that, the plan would exculpate  
5 the exculpated parties for their post-effective-date acts and  
6 omissions prospectively. And as I read the liquidation trust  
7 agreement, the trust could exit up to five years post-  
8 effective-date.

9 No other estate fiduciary receives exculpation in  
10 advance. And some of those fiduciaries, such as the debtors'  
11 professionals and the committee's professionals, are subject  
12 to strict Rule 2014 disclosures and court oversight during  
13 the administration of the case, whereas the liquidation trust  
14 and trustee and its professionals will be subject to  
15 significantly less court oversight post-effective-date.

16 If parties want to seek exculpation at the end of  
17 the case, for example, in connection with a motion for a  
18 final decree, they have the right to seek that. But we  
19 subject that prospective exculpation in advance, potentially  
20 years in advance, depending on how long the trust operates,  
21 is not appropriate.

22 We also object to Section 7.2 of the liquidation  
23 trust agreement, which is filed at Docket Item 481, and is  
24 incorporated into the plan. Section 7.2 adopts the  
25 exculpation provisions in the plan, but it also provides:

1 "In no event shall the trust, trustee, or  
2 liquidation trust advisory board be liable for  
3 indirect, punitive, special, incidental, or  
4 consequential damage or loss, including, but not  
5 limited to lost profits, whatsoever, even if the  
6 trustee has been informed of the likelihood of such  
7 loss or damages and regardless of the form of  
8 action."

9 That provision should be stricken.

10 Back in, I believe it was the late '90s, in the  
11 Daily International decision, Judge Walsh found that such a  
12 provision was not a reasonable term of employment for estate  
13 professionals, who, again, are subject to significantly more  
14 court oversight during the case. We're also concerned that  
15 that provision erodes the exceptions built into exculpation  
16 for wilful misconduct and gross negligence. There is no  
17 reason to give that immunity to a liquidation trustee or  
18 trust and to give that immunity in advance.

19 The committee suggested that exculpation is not a  
20 release. We disagree with that. Exculpation is a release.  
21 A type of release, if you look at the plan, Article 9(c), the  
22 language the plan uses says each exculpated party, quote, "is  
23 released and exculpated from any exculpated claim." So the  
24 plan itself uses "release" language in the exculpation  
25 provision.

1           So, to conclude, Your Honor, we submit that third-  
2 party releases should not be imposed on general unsecured  
3 creditors who did not return a ballot and it should not be  
4 imposed on the debtors' employees. We submit that  
5 exculpation in the plan and the liquidation trust agreement  
6 should not extend prospectively past the effective date. And  
7 also, the waiver of all indirect, punitive, incidental, or  
8 consequential damages whatsoever should be removed from the  
9 liquidation trust agreement. And unless the debtors agree to  
10 those changes, we respectfully submit the Court should deny  
11 confirmation.

12           Unless Your Honor has any questions, that's all I  
13 have.

14           THE COURT: I do not. But Mr. Hackman, you  
15 indicated that you wanted to cross-examine Ms. Tsai and Mr.  
16 Roach.

17           MR. HACKMAN: Yes, Your Honor. I wanted to cross-  
18 examine Ms. Tsai to confirm that the solicitation materials  
19 were sent to approximately 557 general unsecured creditors in  
20 Class 7. And I wanted to cross-examine Mr. Roach about the  
21 holder of the claims in Class 5 and Class 6 --

22           THE COURT: Okay. Well --

23           MR. HACKMAN: -- which is an entity --

24           THE COURT: I'm sorry. I don't want to cut you  
25 off. But if you want to cross-examine them, I would like to

1 have them sworn in and you actually cross-examine them.

2 MR. PACITTI: Your Honor, if I may just interject.  
3 Mr. Hackman and I talked a little bit yesterday about  
4 stipulation to certain facts, and we can certainly stipulate  
5 about what he just argued, and that is the numbers of ballots  
6 that went out to Class 7 as being 557, and the numbers  
7 returned are already on the declaration. And the percentage  
8 of ballot -- net ballots voted is 16.01 percent.

9 I think that's what you wanted to stipulate to, Mr.  
10 Hackman. If I'm misstating or if I missed something, I'm  
11 happy to stipulate that that's the facts.

12 MR. HACKMAN: That -- this is Ben Hackman for the  
13 U.S. Trustee. And with that, I don't need to cross-examine  
14 Ms. Tsai.

15 THE COURT: Okay. And what about Mr. Roach?

16 MR. PACITTI: Your Honor, if I may address that.  
17 In terms of the proposed cross-examination of Mr. Roach, I  
18 don't know that there's any objection by the U.S. Trustee as  
19 it relates to Classes 4, 5, or 6 in any way, so I don't know  
20 what the relevance of that cross-examination would be, but I  
21 just wanted to throw that out.

22 THE COURT: Okay. I didn't hear the end of Mr.  
23 Roach's [sic] comment, initially, as to what he wanted to  
24 cross-examine Mr. Roach about, so ...

25 MR. HACKMAN: That -- this is Ben Hackman for the

1 U.S. Trustee.

2 My understanding -- I'd like to try to clarify the  
3 record. My understanding is that an entity called "Furniture  
4 Factory Note Holding, LLC" is the administrative agent for  
5 the second lien debt in Class 5 and also holds the grid note  
6 claims in Class 6. And my understanding is they're connected  
7 to Sun Capital Partners, of which the debtor did the  
8 portfolio of -- the company is Sun Capital Partners  
9 affiliates, just to make -- in case it wasn't clear, you  
10 know, in case the Court had questions about why Class 5 and  
11 Class 6 did not return a ballot.

12 MR. PACITTI: Your Honor, I don't know why that's  
13 relevant, but we can stipulate that that's correct.

14 THE COURT: Thank you. Does that --

15 MR. HACKMAN: And Your Honor, I --

16 THE COURT: Go ahead, Mr. Hackman.

17 MR. HACKMAN: Yes, Your Honor. I -- I'm sorry. No  
18 need to cross-examine Mr. Roach.

19 THE COURT: Okay.

20 MR. HACKMAN: Thank you, Mr. Pacitti.

21 THE COURT: Thank you.

22 MR. PACITTI: You're welcome.

23 Your Honor, can I just address a couple of things  
24 that Mr. Hackman said? Because I think he may have  
25 misunderstood one of my arguments, and I want to apologize

1 profusely, if I could --

2 THE COURT: Yes --

3 MR. PACITTI: -- but --

4 THE COURT: -- please.

5 MR. PACITTI: When I was talking about Judge  
6 Goldblatt's decision in Alex and Ani, I, in no way, meant to  
7 implicate or insinuate in any way that Mr. Hackman should  
8 have raised this or we should have done this at the  
9 disclosure statement hearing. I was really just pointing out  
10 that that's another judge in our district that appears to be  
11 on the side of the Indianapolis Downs cases and views  
12 consensual releases as appropriate when, you know, adequate  
13 disclosure is set forth. And that's the only reason I -- we  
14 cited to that. I, in no way, was trying to insinuate that  
15 Mr. Hackman should have done something different in these  
16 cases or should have raised it at the disclosure statement or  
17 otherwise. So I just wanted to clarify the record with  
18 respect to that, Your Honor.

19 THE COURT: Okay. Thank you.

20 MR. PACITTI: And I don't know if you wanted to  
21 hear a response or if you've heard enough, Your Honor.

22 THE COURT: No, I would actually like to hear a  
23 response specifically with respect to the U.S. Trustee's  
24 argument regarding current and former employees recently.

25 MR. PACITTI: Sure, Your Honor. And I guess we

1 sort of view that as, you know, they're folks that are either  
2 creditors or on our mailing matrix, so they've gotten notice.  
3 The notice of confirmation hearing went to the entire mailing  
4 matrix, which includes all former and current employees.  
5 There's only a couple of employees currently, as it has been  
6 for months now.

7 So we view them in the same bucket as any other,  
8 you know, party-in-interest here who got notice, saw what was  
9 required in order to object to the conspicuously set forth,  
10 you know, plan provisions with respect to the releases. So  
11 we don't view that as any different, and that's the reason  
12 that we believe it's appropriate here.

13 THE COURT: Were employee claims satisfied in this  
14 case?

15 MR. PACITTI: They were, Your Honor. You know,  
16 everything pre-petition was paid. There was a first-day  
17 order, you know, paying, you know, anything that was accrued  
18 pre-petition that was a carryover. So we don't believe that  
19 there's many, if any, claims left.

20 And also, Your Honor, there's -- there was a bar  
21 date, obviously, that has gone past a long time ago. So, to  
22 the extent that there were any claims filed by employees,  
23 they would be on the matrix; they would be an unsecured  
24 creditor and would have gotten a ballot.

25 THE COURT: Okay. Does anyone else wish to be

1 heard with respect to confirmation of the plan?

2 (No verbal response)

3 THE COURT: I do have one questions regarding the  
4 trust, the trust document. I want to make sure that I  
5 understand this correctly. Mr. Hackman, your position is  
6 that this provision -- if the Court were to limit  
7 exculpation, this provision has to correspondingly be  
8 revised. Is that correct?

9 MR. HACKMAN: Sorry, Your Honor. Can you hear me?

10 THE COURT: Yes, I can.

11 MR. HACKMAN: I'm sorry.

12 In the -- we submit that the provision in Section  
13 7.2 of the liquidation trust agreement that would waive  
14 consequential, punitive, indirect, et cetera damages should  
15 be removed regardless of how -- of what the temporal extent  
16 of the exculpation is, in part because we believe that  
17 undermines the exceptions for gross negligence and wilful  
18 misconduct.

19 THE COURT: Mr. Pacitti, I didn't see where this  
20 was addressed in the debtors' brief. Could you address this  
21 argument, please --

22 MR. PACITTI: Yes.

23 THE COURT: -- or the trustee's argument?

24 MR. PACITTI: Your Honor, I think we viewed that  
25 provision that was objectionable as relating to the



1 limitation of liability provision above, so -- and I see now  
2 that there's a period, perhaps, that picks up. So I would -  
3 and again, I guess I would ask the committee if they would  
4 agree to this, as well, because they were involved in this  
5 hand in hand with us -- that, perhaps if we included the  
6 exception for fraud, gross negligence, and wilful misconduct  
7 that appears above as a lead-in to that sentence, that that  
8 might solve it. So, where it begins "in no event shall the  
9 trust," we say, "except for fraud, gross negligence or wilful  
10 misconduct," comment, "in no event shall the trust, trustee,"  
11 blah, blah, blah, continue.

12 MS. LOTEMPPIO: Your Honor, this is Catherine from  
13 Seward & Kissel on behalf of the Official Committee of  
14 Unsecured Creditors. And we're in agreement with Mr. Pacitti  
15 on that. I think we discussed that yesterday.

16 THE COURT: Mister --

17 MS. LOTEMPPIO: And that was our belief of the  
18 intent of the provision in the first instance.

19 THE COURT: Okay. Mr. Hackman, would that resolve  
20 your issue with respect to that provision?

21 MR. HACKMAN: It helps, Your Honor, but we still  
22 sort of have a -- given that there is case law in the  
23 District that refers to this type of provision as an  
24 unreasonable term or provision of employment for a  
25 professional that is subject to the strict requirements of

1 the Bankruptcy Code, to -- for it to be available for a post-  
2 effective-date entity that's subject to significantly less  
3 court oversight, we don't think is an appropriate protection,  
4 it's -- for the liquidation trustee.

5 It's hard to know what is going to transpire over  
6 the coming months or years. And again, if the liquidation  
7 trustee wants to see exculpation at the end of the case, when  
8 it comes time to final decree the case, and make a showing  
9 that there -- that there's a proper exception for wilful  
10 misconduct and gross negligence, I think the Court and the  
11 parties-in-interest could evaluate the request at that point.  
12 We submit that that would be the proper time for adjudicating  
13 exculpation and whatever liability there may or may not be  
14 for the administration of the trust then.

15 THE COURT: Okay. Thank you.

16 Does anyone else wish to be heard with respect to  
17 confirmation of the debtors' plan?

18 MS. LOTEMPPIO: Your Honor, this is Catherine  
19 LoTempio from Seward & Kissel, again, on behalf of the  
20 official committee.

21 I just wanted -- I don't know if you want me to  
22 respond to the U.S. Trustee's point in the exculpation. In  
23 the trust agreement, I -- we just note that it's -- we  
24 believe it's limited and that it's appropriate for the  
25 trustee -- the liquidation trustee to have the protections of

1 an exculpation in performing its duties as a fiduciary under  
2 -- as a fiduciary to the estate and in the context. As long  
3 as it's acting within its duties, it should be protected and  
4 it should know, when it's performing its duties that it is  
5 entitled to those protections and has those protections,  
6 along with creditors or any other party-in-interest who's  
7 considering potentially filing something against the  
8 litigation [sic] trustee should know that the trustee has  
9 those protections. It's important to the operation of the  
10 liquidation trust. That's it, that's all I have. Thank you.

11 THE COURT: Thank you.

12 Does anyone else wish to be heard with respect to  
13 confirmation of the plan?

14 (No verbal response)

15 THE COURT: I have a few questions for the debtor.

16 One of the questions I have relates to the order  
17 itself. Paragraph 83 provides for extension of the trust.  
18 And the reason I'm asking for this now is because it involves  
19 a plan provision, so I want to make sure that I understand  
20 this correctly. I'm not sure what this provision means.  
21 Does this provision mean that the liquidation trust can ask  
22 the Court to extend the trust without IRS approval, or is it  
23 saying the Court can extend separate and apart from IRS  
24 approval? You know, I appreciate that there are IRS  
25 regulations for trusts and how to get them extended, and I'm

1 trying to figure out what exactly this provision means.

2 MR. PACITTI: I think it's giving you the authority  
3 to extend it, Your Honor, and perhaps it's not as artfully  
4 drafted as perhaps it should be. But if you read the second  
5 sentence, it really talks about filing of a motion, and that  
6 there's an extension pending approval of that motion. I  
7 believe that that was the import of this. So I don't think  
8 that we're saying that you can abrogate the IRS's role.

9 THE COURT: Yeah, I just wanted --

10 MR. PACITTI: I don't --

11 THE COURT: You know --

12 MR. PACITTI: -- think you can --

13 THE COURT: -- if you're required --

14 MR. PACITTI: -- do that.

15 THE COURT: -- to get a favorable letter ruling --

16 MR. PACITTI: Right.

17 THE COURT: -- I am not abrogating the IRS rules.

18 MR. PACITTI: Right.

19 THE COURT: But if you're setting you get a bridge  
20 order while you file or something like that, that's very  
21 different.

22 MR. PACITTI: That's, I think, what the import of  
23 this section was meant to be, and we don't want to get the  
24 IRS angry at any of us, Your Honor.

25 THE COURT: Me neither, so -- all right. Let me

1 just -- wait.

2 With respect to the proposed order, can the debtors  
3 address Paragraph -- never mind. I think that you've  
4 satisfied that. Sorry, I'm going through my notes here.

5 Oh, could you address, in Paragraph 1, the request  
6 for a waiver of the stay of the confirmation order?

7 MR. PACITTI: Your Honor, we don't -- we can -- we  
8 don't need that. Quite honestly, we're probably going to  
9 wait to -- for the appeal period to go effective, in any  
10 event. So, if you're suggesting that you have an issue with  
11 that, I don't have a problem with --

12 THE COURT: I just wanted to make a record.

13 MR. PACITTI: Yeah. I mean, Your Honor, we asked  
14 for it because we thought we'd go effective as soon as  
15 possible. Given there was an extant objection, depending on  
16 how Your Honor rules, there may be an appeal period. I don't  
17 know whether closing or going effective moves that or not.  
18 And given the Third Circuit's sort of discussions about  
19 mootness, who knows what happens then? So my inclination was  
20 to wait the appeal period, in any event.

21 THE COURT: Okay. So are you intending to strike  
22 that provision?

23 MR. PACITTI: If Your Honor is fine and if the  
24 committee is fine with that, we'd agree to it, to strike  
25 that, as well.

1 MS. LOTEMPPIO: Fine with the committee, as long as  
2 it's fine with the debtors.

3 THE COURT: Okay. All right. We're going to take  
4 a brief, five-minute break, and I'll come back and rule.  
5 Okay? Thank you.

6 MR. PACITTI: Thank you, Your Honor.

7 THE COURT: We stand adjourned.

8 (Recess taken at 11:02 a.m.)

9 (Proceedings resume at 11:10 a.m.)

10 THE COURT: Good afternoon. We are back on the  
11 record in Furniture Factory Ultimate Holdings, L.P., Case  
12 Number 20-12816.

13 This is the ruling on confirmation of the debtors'  
14 plan.

15 First of all, I would really like to thank counsel  
16 for the very helpful presentations today, as well as the very  
17 thorough pleadings that you put before the Court on the  
18 contested issues, it's very helpful.

19 I'm going to first address the U.S. Trustee's  
20 objections to the plan. The U.S. Trustee is objecting to the  
21 plan on the basis that it contemplates an improper or a non-  
22 consensual third-party release. This objection is overruled.  
23 I find that the third-party releases are consensual because  
24 creditors did have the opt -- ability to opt out of the plan  
25 release provisions.

1           The ballots contained language that was obvious and  
2 conspicuous regarding the optional release selection and set  
3 forth the text of the plan, Provision 9(d), including the  
4 definitions of "release" and "releasing parties." The ballot  
5 further advised, in making no affirmative election to opt  
6 out, the holder effectively releases all claims of the  
7 released parties.

8           In addition, the notice of confirmation hearing  
9 contained a text box explaining the opt out of the release  
10 and also set forth the deadline to object to the releases in  
11 the plan.

12           Section 1141 binds creditors to a plan, and  
13 creditors need to speak up and object to release provisions,  
14 just like they need to object to other plan provisions that  
15 they disagree with. Here, creditors did, in fact, speak up  
16 and not grant the releases. The tabulation declaration  
17 reflects, of the creditors voting, 18 out of 81 in Class 7 --  
18 that's 22 percent -- opted out of the third-party releases.

19           For these reasons, I find the releases are  
20 consensual. I note this finding is consistent with the  
21 decisions in this district from the Indianapolis Downs line  
22 of cases.

23           Also and significantly, the debtors have added  
24 language in the confirmation order at Paragraph 86, providing  
25 that all holders of claims-in-interests whose solicitation

1 packages were undeliverable are deemed to opt out of the  
2 third-party releases. And because these third-party releases  
3 are consensual, the Court need not address the requirements  
4 for non-consensual releases.

5 The U.S. Trustee objects to the exculpation  
6 provision as overly broad, as it extends past the effective  
7 date. This objection is sustained.

8 First, exculpated parties are limited to estate  
9 fiduciaries in this district.

10 Second, I find that exculpation is limited to  
11 actions taken during the pendency of the cases and prior to  
12 the effective date. I will not prospectively exculpate  
13 actions taken following the effective date, nor will I expand  
14 exculpation to pre-petition acts. These actions are covered  
15 by releases.

16 And I believe that Mr. Hackman has made a good  
17 point, and that parties could -- the trustee could come  
18 forward at the end of the case in seeking a final decree,  
19 seeking exculpation. I make no judgment as to the validity  
20 of that, but it is a possibility.

21 So the definition of "exculpated claim" in 43  
22 should be revised to replace "closing the Chapter 11 cases"  
23 with "effective date," and a corresponding change should be  
24 made to the trust agreement.

25 Based on the record of these Chapter 11 cases, the



1 representations of the parties, and the record that has been  
2 made, including the rulings with respect to the U.S.  
3 Trustee's objections, I will enter the order confirming the  
4 plan.

5 In terms of meeting the standards for confirmation,  
6 the debtors have admitted into evidence the declarations of  
7 Mr. Roach, which is uncontroverted and supports confirmation  
8 of the plan.

9 In addition, Ms. Tsai's declaration with respect to  
10 tabulation of votes explains the debtors have satisfied the  
11 provisions of 1126 for obtaining support of a plan.

12 The debtors filed a comprehensive memorandum of law  
13 in support of confirmation of the plan. And while the  
14 memorandum is not evidence, it is, nonetheless, part of the  
15 record before the Court. The memorandum lays out with  
16 specificity how the debtors have satisfied their various  
17 statutory burdens and requirements. The memorandum also  
18 addresses in detail the provisions of the plan, how the  
19 debtors are compliant with respect to 1129 and, to the extent  
20 applicable, 1123. I am satisfied, therefore, that the  
21 debtors have carried their burden under the provisions of the  
22 Bankruptcy Code for confirmation of the plan.

23 MR. PACITTI: Thank you, Your Honor.

24 Your Honor, I guess we'll revise the order. I'm  
25 trying to think if we should revise the plan, if that's

1 easier, and just attach it to the order, but we can do it  
2 either way. I'll speak to the parties and we'll submit  
3 something under certification of counsel, Your Honor.

4 THE COURT: Okay.

5 MR. PACITTI: I guess this can --

6 THE COURT: And --

7 MR. PACITTI: -- wait until tomorrow.

8 THE COURT: And please, whatever you submit, could  
9 you make sure that you include a blackline --

10 MR. PACITTI: Absolutely.

11 THE COURT: -- and that Mr. Hackman and the United  
12 States Trustee and the committee are included in the  
13 discussions?

14 MR. PACITTI: Absolutely, Your Honor.

15 MS. LOTEMPPIO: Your Honor, sorry. One point of  
16 clarification. On the exculpation in the liquidation trust  
17 agreement, is that to strike the provision in totality or can  
18 the parties agree to that?

19 THE COURT: I would ask -- I was suggesting that  
20 you strike it in its totality, the provision starting with  
21 "in no event."

22 MS. LOTEMPPIO: Okay. Understood.

23 MR. PACITTI: Understood.

24 THE COURT: Are there any other questions? Do we  
25 have any other issues that we need to address today?

1 MR. PACITTI: I think that's it, Your Honor.

2 Just so Your Honor's chambers is aware, I don't  
3 think we'll get anything to you today. So we'll reach out  
4 tomorrow, hopefully get it to you early in the day, and we'll  
5 reach out to chambers to let you know that everything has  
6 been filed.

7 THE COURT: Okay. Thank you very much.

8 MR. PACITTI: And we thank Your Honor --

9 THE COURT: I --

10 MR. PACITTI: -- and chambers.

11 THE COURT: I do have -- I am in tomorrow, I have a  
12 meeting in the morning, but I am in the afternoon, and of  
13 course, I'll be here Monday, as well.

14 MR. PACITTI: Great.

15 THE COURT: Okay.

16 MR. PACITTI: Thank you so much, Your Honor.

17 THE COURT: Thank you.

18 MR. PACITTI: Appreciate it.

19 THE COURT: Have a good day. We stand adjourned.

20 MR. HACKMAN: Thank you, Your Honor.

21 (Proceedings concluded at 11:17 a.m.)

22 \*\*\*\*\*

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

A handwritten signature in cursive script, appearing to read "Coleen Rand", is written over a horizontal line.

September 16, 2021

Coleen Rand, AAERT Cert. No. 341

Certified Court Transcriptionist

For Reliable